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February 9, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, MM Docket No. 92-264

Dear Ms. Searcy:

Enclosed are an original and nine copies of the Comments of Liberty Media Corporation in this proceeding. We would appreciate your assistance in distributing a personal copy of Liberty's Comments to each Commissioner.

Thank you for your assistance in this matter.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

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Enclosures

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

COMMENTS OF LIBERTY MEDIA CORPORATION

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February 9, 1993

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SUMMARY

Liberty Media Corporation ("Liberty") has ownership interests in cable operators and satellite programming services. Consequently, it has a direct and significant interest in the Commission's rulemaking to implement Sections 11 and 13 of the 1992 Cable Act.

Horizontal consolidation and vertical integration have created "efficiencies in administration, distribution, and program procurement" which have resulted in substantial and tangible benefits to consumers. In addition to new facilities, plant extensions, expanded channel capacity and technological advances, the variety, quantity and quality of programming available to cable viewers have increased dramatically. Cable operator investment not only has created or sustained new national programming services, but also has added to the diversity of regional and local programming. Congress and the Commission have recognized that a number of the most "innovative programming services...would not have been feasible without the financial support of cable system operators." Because cable operators have taken the risk and invested in new and unique program services when others would not, cable subscribers have a wider selection of higher-quality programming than ever before.

In spite of the increase in the number of programming services in which cable operators have made an invest-

ment, unaffiliated programmers have been successful in obtaining and maintaining cable carriage. Three separate empirical studies have analyzed whether cable operators discriminate against non-affiliated programmers, and none has found any pattern of discrimination.

The behavioral and structural protections added by the 1992 Cable Act fully address Congressional concern that cable operators might act as a bottleneck to the introduction of new programming or discriminate against alternative distribution media in providing access to programming. Further restrictions on cable operator investments in programming would serve only to eliminate the production of the kinds of "new and risky" programming services which Congress and the Commission have recognized to be in the public interest.

Despite the recognized public interest benefits of cable operator investment in programming and the absence of discrimination, Congress has required the Commission to adopt reasonable channel occupancy limits. In order to preserve incentives for investment in new programming services and the resulting benefits for cable subscribers and programmers, the Commission's channel occupancy rules should intrude on cable operator's programming decisions only to "the minimum necessary" to address actual problems arising from vertical integration in the cable industry. As a preliminary matter, the issue of an appropriate channel occupancy limit is interrelated with the ownership attribution standard adopted by the Commission. Consistent with the analysis set forth in Liberty's comments in MM Docket No. 92-265, control is the appropriate attribution standard to address the underlying Congressional concerns. A cable operator has a real financial incentive to provide the programming most desired by viewers in order to increase and maintain subscribership from which it derives the bulk of its revenues. That incentive clearly outweighs any theoretical incentive to favor carriage of less popular affiliated programming, particularly when the cable operator has only a minority interest in and must share revenues from that programming service with other investors.

Must-carry, PEG and leased access channels offer access to unaffiliated programmers, including those whose complaints gave rise to the Congressional concerns underlying the channel occupancy limits, and must be included in any calculation of such limits. Overly restrictive channel occupancy limits will discourage cable investment in new programming services and are unnecessary to address the Congressional concerns that cable operators might act as a bottleneck to unaffiliated programmers. In analyzing vertical foreclosure cases, courts consistently have found that a very substantial percentage of the market must be foreclosed even to require further analysis of potential competitive injury.

Any channel limits should apply only to programming affiliated with the cable operator of that particular system. Because of the public interest benefits derived from the local origination of programming, the Commission should exempt local and regional programming from such limits. Finally, the channel occupancy limits, which are intended to prevent cable operators from becoming a bottleneck for programming, should not apply where alternative distribution media are present or channel capacity exceeds a specified threshold limit.

Clearly, companies such as Liberty which already have made substantial programming investments should not be penalized by the Commission. Consequently, the Commission should grandfather "any existing vertical relationships which exceed the channel occupancy limits at the time such limits are adopted" as it has proposed. However, in order to promote the public interest benefits identified by the Commission, the grandfathered limits should be set slightly above existing levels to permit reasonable additional program investments and the "roll-out" of new programming services already being developed. The Commission also should establish a waiver procedure by which a cable operator can demonstrate that an affiliated programming service is being added in response to viewer demand.

Any horizontal concentration regulations adopted by the Commission should apply only at the national level.

Based on the economics of the program marketplace and the Senate Report's disclaimer of any intent to require divestiture by any company, a national ownership limit in the range of 35 to 40 percent of homes passed would preclude the potential programming bottleneck of concern to Congress. Again, an attribution standard of control is appropriate.

The Commission's anti-trafficking rules should be prospectively applied, limited to transfers of controlling interests, and inapplicable to non-taxable, government required, or pro forma transfers. This implementation approach is consistent with the Commission's approach to the transfer of ownership interests in broadcast licensees and will fully address the Congressional intent to restrict "profiteering transactions which are likely to adversely affect cable rates or service." In order to ensure consistent interpretation and application of its anti-trafficking rules, the Commission must administer and enforce those rules.

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COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty") submits these comments in response to the Commission's Notice of Proposed Rule Making and Notice of Inquiry ("Notice") in this proceeding. The Commission must consider the comprehensive behavioral regulations being implemented under other sections of the 1992 Cable Act and avoid overly broad structural limits under Section 11 that will jeopardize the benefits to both subscribers and programmers achieved through horizontal consolidation and vertical integration.

Liberty's Interest In This Proceeding

As an owner of both cable programming and operating interests, Liberty is directly interested in this proceeding. More specifically, Liberty has ownership interests, many of which are non-controlling, in a number of partnerships and corporations which operate cable television systems. Liberty has substantial ownership interests in Encore (90 percent) and American Movie Classics (50 percent) and minority interests in The Family Channel, QVC Network, Black Entertainment Television, The Jukebox Network, and Court TV.[1] Liberty also has direct or indirect ownership interests in several regional sports programming services and in Prime SportsChannel Networks, which provide a "backdrop" feed to such services. Finally, Southern Satellite Systems, Inc., a satellite carrier of SuperStation WTBS, and X*PRESS Information Services Ltd., which provides the national information services known as X*PRESS Executive and X*PRESS X*CHANGE, are wholly-owned subsidiaries of Liberty.

Preliminary Statement

Both the Commission and Congress have recognized that cable operator investments in programming have benefited the public: "The quality and diversity of programming available to consumers and cable's annual investment in programming has increased greatly." Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) ("House Report"). Such investments have made "the creation of innovative, and risky, programming services possible." Id. at 41. The net result of such "vertical inte-

[1] Liberty is seeking to acquire a controlling interest in the Home Shopping Network.

gration" is clear -- more and better programming is available to cable viewers.

Nonetheless, in enacting the Cable Television Consumer Protection And Competition Act of 1992 ("1992 Cable Act"), Congress expressed concern that increasing horizontal concentration and vertical integration in the cable industry could create "barriers to entry for new programmers" and cause "a reduction in the number of media voices available to consumers." Notice at ¶5. To address these and other concerns, Congress imposed significant additional behavioral restrictions on cable operators and affiliated programmers.

The Commission considers in this proceeding regulations limiting: (1) transfers of ownership interests in cable systems (Notice at ¶¶7-23); (2) the number of subscribers served by any multiple system operator ("MSO") (Id. at ¶¶29-40); and (3) the number of channels on a given system occupied by programmers in which the cable operator holds an attributable interest (Id. at ¶¶41-55). The Commission also inquires whether it should limit the degree to which a multichannel video programming distributor "may engage in the creation or production of video programming." Id. at ¶56.

In crafting regulations to address these issues, the Commission must balance the potential for discrimination against the demonstrated benefits of horizontal consolidation and vertical integration. That balance should reflect the fact that no pattern of discrimination has been found and that Congress recognized "some concerns about discrimination against rival programming services may be overstated." House Report at 41. In view of the numerous behavioral protections imposed by the 1992 Cable Act, the Commission should avoid structural regulations which would stifle further investment in cable systems and programming and unnecessarily forego the recognized benefits of horizontal consolidation and vertical integration.

I. Cable Operator Investments In Programming Have Benefited Both Viewers And Programmers.

There can be no doubt "that certain benefits derive from vertical integration and horizontal concentration" in the cable industry.[2] Notice at ¶6. Horizontal consolidation and vertical integration have created "efficiencies in administration, distribution, and program procurement" which result in substantial and tangible benefits to consumers. Id. As a

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[2] Congress has identified significant "benefits to consumers" resulting from horizontal consolidation:

> [T]he growth of MSOs in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming. Further, programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country. Moreover, large MSOs, able to take risks that a small operator would not, can provide a sufficient number of subscribers to encourage new programming entry.

House Report at 43.

result of investment in new facilities and plant extensions, cable now passes over 90 percent of all American homes, and subscribership has increased from 37 million in 1984 to over 55 million in 1992. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 4967 (1990) ("Report to Congress"); Broadcasting, Feb. 1, 1993, at 58. More recent Arbitron figures report substantially higher subscribership levels. See Broadcasting, Feb. 8, 1993, at 32 (reporting "total" cable subscribership of 58,533,400 as of November 1992). Average channel capacity has increased from 29 to approximately 36 channels. Report to Congress, 5 FCC Rcd. at 4966; Cable Television Consumer Protection Act of 1991, S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991) ("Senate Report"). Thus, more people have access to more channels today than even before.

The variety, quantity and quality of the programming carried on those channels also have increased dramatically. Annual cable investment in programming has more than tripled since 1984. Report to Congress, 5 FCC Rcd. at 4966. During the period from 1984 to 1989, the number of cable programming services had more than doubled. Id. The increasing quality of the programming available to cable viewers is evidenced by the growing viewership and audience ratings of basic cable services which have more than doubled since 1984.

Id. at 4967; see National Cable Television Association, "Cable Television Developments," 5-A (Oct. 1992).

In addition to creating or sustaining new national programming services, cable investment has added to the diversity of regional and local programming. Regional sports and other "niche services" have been among the "primary growth areas" in cable programming in recent years. Report to Congress, 5 FCC Rcd. at 4966 n.8. Cable operators increasingly are investing in regional and local news channels and other local programming. See, e.g., Report to Congress, 5 FCC Rcd. at 4993 n.88 ("award-winning local programming" of Continental Cablevision of Western New England); Multichannel News, Jan. 11, 1993, at 16 (in-kind grant of satellite time by TCI ensures that California Channel "could continue to offer 35 hours a week of unedited coverage of the state Assembly and Senate"). In addition, cable operators often provide a variety of locally originated channels featuring information of particular interest to local subscribers, including community bulletin boards, job listings, airline schedules at local airports, video real estate listings, and similar services.

Congress and the Commission have recognized that a number of the most "innovative programming services...would not have been feasible without the financial support of cable system operators." House Report at 41; see also Report to Congress, 5 FCC Rcd. at 5009 (cable investment "rescued" the Discovery Channel). In the words of Robert L. Johnson, President of Black Entertainment Television, cable television investment "has done more to create minority programming and diversity in television than all FCC regulations and broadcasting outreach programs combined." Media Ownership: Diversity And Concentration: Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science And Transportation, 101st Cong., 1st Sess. 221 (1989) (Statement of Robert L. Johnson). As recognized by the National Association of Broadcasters ("NAB"), cable operators have provided "numerous unique services and niche programming which could not otherwise be made available in most markets." Report to Congress, 5 FCC Rcd. at 4993 n.88, quoting NAB Reply comments in MM Docket No. 89-600, filed Apr. 2, 1990, at 2. Because cable operators have taken the risk and invested in new and unique program services when others would not, cable subscribers have a wider selection of higher-quality programming than ever before.

In spite of the increase in the number of programming services in which cable operators have made an investment, unaffiliated programmers have been successful in obtaining and maintaining cable carriage. Of the top 20 national cable programming services in terms of total subscribers, one-third have no cable ownership affiliation. Their success simply confirms that: (1) cable ownership is not a prerequisite to successful entry into cable programming; and (2) cable operators do not discriminate against non-affiliated programmers. At least three separate empirical studies have analyzed this issue, and none has found any pattern of discrimination by cable operators against unaffiliated programmers. United States Department of Commerce, Video Program Distribution And Cable Television: Current Policy Issues And Recommendations (NTIA Report 88-233, June 1988) ("NTIA Study") at 102; B. Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry," June 1989 ("Klein Study") at 44; R.W. Crandall, "Vertical Integration And q Ratios in the Cable Industry," Apr. 1990 ("Crandall Analysis") at 2-6.[3]

Cable operator investments in programming have fostered -- not stifled -- the development of new and diverse programming services. Because of its active involvement in cable programming, Liberty regularly receives unsolicited proposals for investment in new programming services. Liberty continues to evaluate the feasibility of such services and believes that Commission rules which directly or indirectly

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[3] During its exhaustive analysis of the effects of vertical integration on cable television carriage decisions, the Commission identified only three alleged instances of discrimination in carriage, two of which involved broader ongoing commercial disputes between the cable operator and programmer. The third instance of alleged discrimination concerned disputes surrounding cable carriage of CNBC, a programming service that was launched successfully and is carried by cable systems to over 46 million subscribers. Report to Congress, 5 FCC Rcd. at 5028-30; CableVision, Sept. 21, 1992, at 54.

curtail its investments in such programming would undermine the goals of diversity and expansion of programming choices which Congress intended to foster.

II. Limits On Cable Operator Investments In Programming Or Restrictive Channel Occupancy Rules Will Adversely Affect Program Diversity.

Despite the overwhelming empirical evidence that vertically integrated cable operators do not discriminate against unaffiliated programmers, Congress has expressed concern that they "have the incentive and ability" to do so. See 1992 Cable Act, Section 2(a)(5). In adopting regulations to address the potential harm perceived by Congress, the Commission is required, among other things, to "promote the...diversity of views and information through cable television and other video distribution media" and to "rely on the marketplace, to the maximum extent feasible." See 1992 Cable Act, Sections 2(b)(1) and (2). Consistent with this mandate, the Commission should neither directly limit cable operator investments in programming nor discourage such investment by adopting overly restrictive channel occupancy limits.

A. Limitations On Cable Operator Investments In Programming Are Unnecessary And Contrary To The Public Interest.

After completing an extensive examination and analysis of vertical integration in the cable industry, the Commission concluded that the growth of vertical integration had "added potential for certain anticompetitive conduct" but had "brought substantial benefits to American consumers." Report to Congress, 5 FCC Rcd. at 4972. As set forth in Section I supra, the Commission found that vertical integration had "increased both the quality and quantity of program services available to the viewing public." Id. at 5007. In short, the investment by cable operators in programming services has resulted in a "net economic benefit" to consumers. See NTIA Study at 89-102; Klein Study at 4; Crandall Analysis at 3-4, 20.

The Commission should be guided by its prior conclusions in fulfilling its Congressional mandate to "consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming." Section 613(f)(1)(c). Liberty respectfully submits that the Commission's findings, based on its prior exhaustive analysis, strongly support its tentative conclusion that any objectives to be served by regulating the ability of multi-channel distributors to create or produce video programming are "fully addressed by the other provisions of Section 11, Section 12, and Section 19 of the 1992 Cable Act." Notice at ¶60.[4]

[4] Each of these sections imposes significant additional behavioral restrictions on cable operators with ownership interests in programming. Section 11 requires regulations limiting horizontal concentration and the number of channels which a cable operator may utilize for affiliated programming.

The behavioral and structural protections added by the 1992 Cable Act fully address Congressional concern that cable operators might act as a bottleneck to the introduction of new programming or discriminate against alternative distribution media in providing access to programming. Further restrictions on cable operator investments in programming would serve only to eliminate the production of the kinds of "new and risky" programming services which Congress and the Commission have recognized to be in the public interest.

B. Overly Restrictive Channel Occupancy Limits Will Stifle Investment In New Programming Services And Decrease Diversity.

Despite the numerous public interest benefits of cable operator investment in programming and the absence of empirical evidence of discrimination by vertically integrated cable operators, Congress has required the Commission to establish "reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." Section 613(f)(1)(B). The legislative history of this provision

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Section 12 requires regulations to prohibit coercion, discrimination and retaliation by cable operators directed at programmers. Section 19 prohibits unfair or deceptive acts or practices which impede the distribution of video programming, including discrimination and exclusive agreements which are not in the public interest. Moreover, Sections 4 and 5 require the carriage of local commercial and educational broadcast signals, and Section 9 ensures that the terms and conditions of leased commercial access will be reasonable.

states that although "the FCC is given discretion in establishing the reasonable limits on horizontal and vertical integration...the FCC must adopt some limitations."[5] Senate Report at 80. In order to preserve incentives for investment in new programming services and the resulting benefits for cable subscribers and programmers, the Commission's channel occupancy rules should intrude on cable operators' programming decisions only to "the minimum necessary" to address actual problems arising from vertical integration in the cable industry. See Senate Report at 18.[6]

1. Adoption Of Broadcast Attribution Standards Would Reduce Program Diversity.

The 1992 Cable Act does not specify what attribution standards should be applied in connection with the channel

[5] Liberty believes that the channel occupancy limits imposed by Section 613(f)(1)(B) are constitutionally suspect. However, the Commission has not solicited comment on the constitutionality of the statute. Further, because the Commission has not proposed specific rules to implement this section, Liberty cannot determine whether the application of such rules to it would raise additional constitutional issues. Therefore, Liberty expressly reserves its right to challenge the constitutionality of Section 613 and of the Commission's implementing rules and does not waive such right by participating in this proceeding.

[6] Appropriate limits will be particularly difficult to develop because: (1) the parties to this proceeding will not have the benefit of knowing the outcome of other rulemaking and court proceedings which will affect the "reasonableness" of any channel occupancy limit; and (2) no empirical study has identified the existence of actual discrimination resulting from the potential for such discrimination perceived by Congress.

occupancy limits pursuant to Section 613(f)(1)(B). The legislative history suggests only that the Commission use the broadcast attribution standard "or such other criteria as the Commission may deem appropriate in implementing channel occupancy limits." Notice at ¶46. However, the Commission questions whether "higher attribution thresholds are warranted" under Section 613(f)(1)(B) "in order to provide cable operators with the flexibility to continue investing in new cable programming services."[7] Id.

As set forth in Liberty's Comments in MM Docket No. 92-265, filed Jan. 25, 1993, at 12-17, the Commission's broadcast multiple ownership rules promote substantially different policies and objectives than the provisions of the 1992 Cable Act addressing the relationship between cable operators and programming services.[8] Consequently, the broadcast attri-

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[7] The Commission already has recognized that changes "in economic and competitive circumstances" over the past eight years have resulted in "materially different" conditions mandating an increase in the existing broadcast attribution rules. Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51 (rel. Apr. 1, 1992), at ¶9.

[8] The broadcast ownership attribution standard implements multiple ownership rules designed primarily to promote diversity of viewpoints in the context of the limited spectrum available for broadcast use. Corporate Ownership Reporting And Disclosure by Broadcast Licensees, 58 R.R.2d 604, 606 (1985), on recon., 1 FCC Rcd. 802 (1986). These First Amendment concerns, which the Commission concedes are "unique and require distinct analysis," have necessitated "a cautious approach" with respect to broadcast ownership attribution. Corporate Ownership Reporting And Disclosure by Broadcast Licensees, 97 F.C.C.2d 997, 1002-04 (1984), on recon., 58 R.R.2d 604 (1985), on further recon., 1 FCC Rcd. 802 (1986).

bution rules are inappropriate for purposes of Section 613(f)(1)(B).

Unless the Commission adopts an attribution standard based on control, the channel occupancy limits provided for in Section 613(f)(1)(B) combined with the program access requirements of Section 628(c)(2)(B) would likely curtail further investment by cable operators in new program services. It is unreasonable to expect continued cable operator investment in new program services that cannot be carried on the operator's systems because of channel occupancy limits but which must be made available to competitors at regulated prices, terms and conditions pursuant to Section 628(c)(2)(B). Unreasonably low attribution standards under these two statutory provisions unquestionably would reduce investment in new programming and are unnecessary to promote the Congressional objectives underlying those provisions.

Section 613(f)(1)(B) is intended to respond to Congressional concerns that vertically integrated programmers "have the incentive and the ability to favor their affiliated cable operators" and that vertically integrated cable operators "have the ability and the incentive to favor their affiliated programmers." Notice at ¶42. As Liberty explained in its comments in the program access proceeding, control clearly is the appropriate attribution standard to address the first of these concerns. Section 628(c)(2)(A) prevents a cable operator with a minority voting interest in a programmer from using its interest to unduly influence that programmer to disfavor the cable operator's competitor. See Comments of Liberty Media Corporation in MM Docket No. 92-265, filed Jan. 25, 1993, at 16-17. Thus, as NTIA has recognized, "to the extent vertical integration gives a cable operator the incentive to withhold an affiliated program service from a competing video distribution media...the operator will be unable to act on that incentive (in the absence of collusion) unless his ownership interest in the service confers control." NTIA Study at 89 n.286.

Control is also the appropriate attribution standard to address Congress' other concern, albeit for different reasons. Although a cable operator may have the ability to "favor" an affiliated programmer in carriage decisions, there is little evidence to support the existence of any incentive to do so. For example, NTIA hypothesizes that, all other things being equal, a cable operator theoretically has an incentive to favor an affiliated programmer even where it holds only a minority interest in the programmer. Id. However, NTIA readily admits that there is no empirical evidence of any pattern of discrimination by vertically integrated cable operators against unaffiliated programmers. Like every other empirical study of this issue, NTIA concluded that there was no nexus between vertical integration by cable operators and discrimination against:

> (1) Unaffiliated Pay Services -- "[T]here is scant support for the notion that vertical integration into pay programming by MSOs has led them to discriminate against unaffiliated services, thereby reducing the availability of pay services to their subscribers;"
>
> (2) Unaffiliated Basic Services -- "[C]ommon ownership of cable systems and [basic] cable programming services does not appear to affect adversely the supply of cable programming or the diversity of viewing choices...carriage of affiliated services generally does not occur to the exclusion of unaffiliated services."

NTIA Study at 98 and 102. These results have been confirmed in subsequent empirical studies. See, e.g., Klein Study at 44 ("there is no evidence of systematic discrimination by vertically integrated MSOs" against unaffiliated programmers); Crandall Analysis at 3 ("there is absolutely no evidence of systematic discrimination due to vertical integration" in program carriage by the TCI systems analyzed).

Thus, the theoretical incentive for discrimination postulated by NTIA has not materialized. Cable operators must consider numerous factors in making program carriage decisions. Among other things, they clearly have "incentive to put on programming that increases subscribership and decreases churn," regardless of whether they have an ownership interest in such programming. Senate Report at 24. The incentive to increase subscribership -- from which the cable operator exclusively derives the additional revenues -- outweighs any